No. 82-1651

In The

Supreme Court of the United States

October Term, 1983

CRISPUS NIX, WARDEN OF
THE IOWA STATE PENITENTIARY,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Court of Appeals exceeded its authority in reaching out to an issue not presented to or litigated in the state or federal trial courts in order to reverse a denial of habeas corpus by the District Court?

2. Whether the Court of Appeals violated the dispositional rule in *Jackson v. Denno*, 378 U. S. 368 (1964), by mandating a third new trial rather than remanding the case for a limited proceeding where reversal was based on an issue of constitutional fact which arose only on appeal and on which the State has not had a fair opportunity to present evidence?

3. Whether the Court of Appeals correctly concluded, on the record before it, that the State could not show lack of bad faith on the part of police, when, as the Iowa Supreme Court unanimously observed, "the propriety of police conduct . . . has caused the closest possible division in every appellate court which has considered the question?" *State v. Williams*, 285 N. W. 2d 248, 260 (Iowa 1979) (A. 45).

4. Whether the inevitable discovery exception to the exclusionary rule requires the State to show lack of subjective bad faith on the part of police officers?

5. Whether the rule in *Stone v. Powell*, 428 U. S. 465 (1977) should be extended to a Sixth Amendment case where highly probative and reliable physical evidence is challenged in a habeas proceeding after a full and fair opportunity to raise the issue on direct review in state courts?

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The opinion of the Court of Appeals (Pet. App. A, pp. 1-18) and the orders denying rehearing and rehearing en banc (Pet. App. B and C, pp. 19-27) are reported at 700 F. 2d 1164 (8th Cir. 1983). The opinion of the federal district court (Pet. App. F., pp. 68-88) is reported at 528 F. Supp. 664 (S. D. Iowa 1981). The opinion of the Iowa Supreme Court on direct review (Pet. App. E, pp. 28-67) is reported at 285 N. W. 2d 248 (Iowa 1979).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on January 10, 1983. Timely petitions for rehearing and rehearing en banc were denied on March 15, 1983, and this petition for certiorari was filed within 90 days of that date. This Court granted certiorari on May 31, 1983, *Nix v. Williams*, 51 U.S.L.W. 3851 (U. S. May 31, 1983) (No. 82-1651). This Court's jurisdiction is invoked under 28 U. S. C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Amendment Six

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

United States Code, Title 28, Section 2254

> (a) The Supreme Court, a Justice thereof, a circuit judge or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

This Court is already familiar with the tragic character of this 15 year old proceeding since it has been here before on certiorari. *See Brewer v. Williams,* 430 U. S. 387 (1977). For the second time, Williams' conviction of first degree murder has been set aside by federal courts exercising habeas jurisdiction.

On Christmas Eve, 1968, ten year old Pamela Powers disappeared from the Des Moines YMCA where she had been watching a wrestling match with her family. Suspicion focused on Williams, an escaped mental patient residing at the YMCA, who was seen leaving the building with a large bundle wrapped in a blanket. A boy who helped Williams open his car door testified that he viewed the bundle and "saw two legs in it and they were skinny and white." 430 U. S. at 390.

Law enforcement officials began a massive search to find Williams who eventually surrendered to police in Davenport, Iowa, some 160 miles from Des Moines. While transporting Williams back to Des Moines from Davenport, Detective Cletus Leaming obtained information from Williams about the whereabouts of the girl's body. Following Williams' directions, the police uncovered the body of Pamela Powers. Medical examination of the corpse revealed presence of acid phosphatase, a component of semen, in her body as well as pubic hairs on the victim's clothing "like" those of Williams. *See Williams v. Nix,* 700 F. 2d 1164, 1168 (8th Cir. 1983), *cert. granted* 51 U.S.L.W. (U. S. May 31, 1983) (No. 82-1651) (Pet. App. 7-8).

Williams was tried and convicted of first degree murder. At trial, the State introduced the articles of clothing, evidence relating to the body's discovery and condition, and incriminating statements made to Detective Leaming

by the defendant. 430 U. S. at 394. The conviction was affirmed in a five to four decision by the Iowa Supreme Court. *State v. Williams,* 182 N. W. 2d 396 (Iowa 1970). On collateral review, however, the United States District Court for the Southern District of Iowa sustained Williams' petition for a writ of habeas corpus, *Williams v. Brewer,* 375 F. Supp. 170 (S. D. Iowa 1974), and a divided panel of the United States Court of Appeals for the Eighth Circuit affirmed. 509 F. 2d 227 (8th Cir. 1974).

This Court, in a five to four decision, affirmed the grant of the writ. *Brewer v. Williams,* 430 U. S. 387 (1977). The majority found that an agreement had been made between Williams' attorney and unnamed Des Moines police officers that the defendant would not be interrogated on his way back to Des Moines. 430 U. S. at 391. The Court further found that Detective Leaming, while avoiding directly questioning Williams, did nevertheless attempt to elicit information from him by making statements about the victim's need for a decent Christian burial. 430 U. S. at 399. The majority found Leaming's action violated the defendant's right to counsel guaranteed by the Sixth and Fourteenth Amendments and held that introduction of evidence discovered as a result of the interrogation was erroneous and required reversal. 430 U. S. at 406.

In an important footnote, however, the Court majority noted that while communicative evidence from the defendant could not be constitutionally admitted under any circumstance, the physical evidence, the body and its condition:

> might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams. . . . In the event that a retrial is instituted, it will be for the state courts in the first instance to de-

termine whether particular items of evidence may be admitted.

430 U. S. at 441, n. 12.

The State retried Williams and sought to introduce evidence about the body under the "inevitable discovery" exception to the exclusionary rule alluded to in the above footnote. A suppression hearing was held in state court at which the defense contested the prosecution's claim that the body "would have been discovered in any event." 430 U. S. at 441, n. 12. The state trial court heard testimony regarding the law enforcement search efforts in the area where the body was eventually found. The trial court held that the body would have been discovered anyway and denied Williams' motion to suppress. *See State v. Williams,* 285 N. W. 2d 248, 260-62 (1979) (Pet. App. 46-8).

With testimony about the body and its condition admitted, Williams was again convicted of first degree murder. The Iowa Supreme Court sua sponte raised the question of whether the State must show that police did not act in bad faith for the purpose of hastening discovery of the body before it could constitutionally invoke the inevitable discovery exception. *State v. Williams,* 285 N. W. 2d 248, 260 (Iowa 1979) (Pet. App. 40-41). The Iowa Court found such a requirement, but unanimously held that on the record the State had plainly satisfied the test. The Court stated:

> The issue of the propriety of the police conduct in this case, as noted earlier in this opinion, has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.

State v. Williams, 285 N. W. 2d 248, 260 (Iowa 1979) (Pet. App. 45).

Williams then launched another assault on his conviction in federal district court. He raised seven other questions not now before the Court. With respect to the application of the inevitable discovery exception, Williams limited his challenge to reargument of the defense position before the state trial court, namely, that the body would not, in fact, have been "inevitably discovered" because of the lack of thoroughness in the police search and the difficulty in observing a snow-covered body.

The District Court denied the writ, holding, *inter alia*, that the inevitable discovery exception existed and was properly invoked. *Williams v. Nix*, 528 F. Supp. 664, (S. D. Iowa 1981) (Pet. App. 75-80). The District Court opinion contained no finding on the lack-of-bad-faith issue. On appeal, the Court of Appeals for the Eighth Circuit reversed. A three-judge panel held that "the State did not satisfy its burden of proving by a preponderance of evidence that the police did not act in bad faith in obtaining Williams' statements that led them to the body." *Williams v. Nix*, 700 F. 2d at 1173 (Pet. App. 17).

The State then sought rehearing both before the original panel and en banc. On March 15, the original panel denied rehearing. In a four page opinion, the court, while noting "concessions" made by the state in oral argument, also held that admission of the challenged physical evidence "would impermissibly reduce the deterrent effect of the exclusionary rule." *Williams v. Nix*, 700 F. 2d at 1174 (Pet. App. 23).

On the same day, the Court of Appeals denied rehearing en banc by a four to four vote. Judge Fagg, joined by Judges Bright and Ross, filed a dissenting opinion noting

that the lack of bad faith issue "has not been placed in issue or litigated in the state and federal trial courts." *Williams v. Nix*, 700 F. 2d at 1164 (Pet. App. 20). He noted that the State and the defense both viewed the inevitable discovery exception at trial as having "only *one* prong, inevitable discovery of the body, and that was the issue presented to the trial judge." *Id.* Only later did the Iowa Supreme Court inject the second prong, good faith, into the case. Rather than remand the case "to the trial court for a limited evidentiary hearing," the Iowa Supreme Court "ruled as a matter of law that Officer Leaming acted in good faith." *Id.* at 1176 (Pet. App. 21). The dissent thus argued, at a minimum, that some kind of limited remand should be considered. *Id.*

This Court granted certiorari to review the ruling and opinion of the Court of Appeals on May 31, 1983.

SUMMARY OF ARGUMENT

In this case, the Court of Appeals committed errors of both procedure and substance. In setting aside Respondent's second conviction, the Court did not expressly embrace an inevitable discovery exception to the exclusionary rule, but found that if such an exeception existed, the State must show absence of bad faith before it could be invoked. The Court then concluded as a matter of law that the Petitioner had failed to make the necessary showing on the issue. This conclusion was reached notwithstanding the fact that the issue was not litigated in either the state or federal trial courts. Finally, the Court declined to extend the doctrine of *Stone v. Powell*, 428 U. S. 465 (1976), to the case notwithstanding Respondent's attempt to relitigate admissibility of highly probative and reliable, physical evidence in a habeas corpus proceeding.

Petitioner believes that the Court erred in finding that a showing of absence of bad faith is required before the State can invoke the inevitable discovery exception to the exclusionary rule. This exception, which has been adopted in one form or another by all the federal circuits, has not generally been held to require absence of bad faith. In independent source rule cases, no showing of absence of bad faith is required since the inquiry is limited to causation. Similarly, a showing of absence of bad faith should not be required to invoke the inevitable discovery exception, where the only issue is whether the challenged evidence in fact would have been discovered by lawful means.

Even if absence of bad faith is required, Petitioner believes the Court of Appeals erred in its treatment of the issue. Petitioner believes that any limitation on inevitable discovery based on the character of police conduct should apply only where knowing constitutional violations are so egregious that the spectacle of continued criminal prosecution of the accused cannot be tolerated. This standard is appropriate because allowing a collateral mistake to poison even fruit that would have inevitably been discovered by lawful means often amounts to immunity from prosecution notwithstanding the reliability of the evidence in question.

In any case, Petitioner has made a showing of absence of bad faith even if more exacting judicial scrutiny similar to that employed under 42 U. S. C. § 1983 is appropriate. The record of Respondent's first trial shows that Detective Leaming attempted to tailor his conduct to what he thought were constitutional requirements. He read Respondent *Miranda* rights, did not question him directly,

and freely volunteered his story about the so-called Christian burial speech in open court. While Leaming committed constitutional error, it does not appear to have been in bad faith.

It is also clear that Leaming cannot reasonably be charged with knowing that his conduct was unconstitutional. The rule in *Massiah v. United States,* 377 U. S. 201 (1964), had not yet been extended to situations where the accused actually knows he is talking to a police officer, and the definition of interrogation under *Miranda* had not been authoritatively explored. Indeed, the closeness of the issue in this Court conclusively demonstrates that Leaming could not have known his conduct was unconstitutional. *Brewer v. Williams,* 430 U. S. 387 (1977).

The Court of Appeals disposition of the case reveals further error. Examination of the transcript of the hearing on Respondent's motions to suppress in state court shows that the absence of bad faith question was not litigated at trial. The absence of appropriate pleadings by Respondent and the lack of findings by the Federal District Court on the issue also confirms that the question was not actually litigated in federal court. Under the circumstances, there is serious question as to whether the Court of Appeals should have considered the issue at all, let alone deny the State an opportunity to make an evidentiary showing on the question.

Finally, the Court erred in not extending the doctrine in *Stone v. Powell,* 428 U. S. 465 (1976), to the facts presented here. The entire rationale of *Stone v. Powell* applies with full force to this Sixth Amendment case where the inevitable discovery exception is invoked to allow admission of highly probative and reliable physical evidence. Police will be adequately deterred by the possibility of

losing convictions on direct appeal. The marginal deterrence value of relitigating the issue in habeas proceedings is minimal. Under the circumstances, the interests in finality and repose, particularly where admission of evidence enhances the integrity and reliability of the factfinding process, overrides all other considerations.

ARGUMENT

I. Where the record shows that highly probative and reliable physical evidence discovered as a result of illegal law enforcement action imminently would have been discovered by lawful independent investigative activity already in progress, the evidence is admissible through the inevitable discovery exception to the exclusionary rule without examination of the subjective state of mind of police officers who engaged in the unlawful conduct.

In reversing the rulings of the trial court, the Iowa Supreme Court, and the Federal District Court in this case, the Court of Appeals held that even conceding arguendo the existence of an inevitable discovery exception to the exclusionary rule, the State must affirmatively demonstrate the absence of bad faith on the part of the police officers found to have engaged in illegal conduct.[1] In Petitioner's view, not only is the inevitable discovery doctrine a constitutionally permissible exception to the exclusionary rule but, under the facts and circumstances presented here, it may be invoked without a showing of lack of bad faith by police officers.

A. As unanimously developed in the federal circuits, the inevitable discovery exception is consistent with this Court's well-established approach to the exclusionary rule and has strong policy footing.

[1] *Williams v. Nix*, 700 F. 2d 1164, 1173 (8th Cir. 1983) (Pet. App. at 17).

This Court, notwithstanding a suggestive footnote in *Brewer v. Williams*, 430 U. S. 387 (1977), has not yet had occasion to employ expressly an inevitable discovery exception to the exclusionary rule.[2] All of the Courts of Appeals, however, have addressed the issue, and all have eventually embraced, in one form or another, an inevitable discovery doctrine. Influenced by this Court's express adoption of "attenuation" and "independent source" exceptions to the exclusionary rule, *see Wong Sun v. United States*, 371 U. S. 471, 487-88 (1963) (attenuation); *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392 (1920) (independent source), these cases stand for the proposition that where evidence would have been discovered in any event by legitimate law enforcement activity, the interest in presenting the trier of fact with reliable evidence outweighs whatever deterrence might be accomplished by exclusion.[3] This cautious approach to the application of the exclusionary rule is consistent with this Court's general direction that the rule should be carefully "restricted to those areas where its remedial objectives are thought to be most efficaciously served." *United States v. Calandra*, 414 U. S. 338, 348 (1974).

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[2]*Brewer v. Williams*, 430 U. S. 387, 406 n. 12 (1977).

[3]See *Wayne v. United States*, 318 F. 2d 205, 209 (D. C. Cir.), *cert denied*, 375 U. S. 860 (1963); *United States v. Bienvenue*, 632 F. 2d 910, 914 (1st Cir. 1980); *United States v. Fisher*, 700 F. 2d 780, 784 (2d Cir. 1983); *Government of the Virgin Islands v. Gereau*, 502 F. 2d 914, 927-928 (3d Cir. 1974), *cert. denied*, 420 U. S. 909 (1975); *United States v. Seohnlein*, 423 F. 2d 1051, 1053 (4th Cir.), *cert. denied*, 399 U. S. 913 (1970); *United States v. Brookins*, 614 F. 2d 1037, 1042, 1044 (5th Cir. 1980); *Papp v. Jago*, 656 F. 2d 221, 222 (6th Cir. 1981); *United States ex rel. Owens v. Twomey*, 508 F. 2d 858, 865-866 (7th Cir. 1974); *United States v. Apker*, 705 F. 2d 293, 306-307 (8th Cir. 1983); *United States v. Schmidt*, 573 F. 2d 1057, 1065-1066 n. 9 (9th Cir.), *cert. denied*, 439 U. S. 881 (1978); *United States v. Romero*, 692 F. 2d 699, 704 (10th Cir. 1982); *United States v. Roper*, 681 F. 2d 1354, 1358 (11th Cir. 1982).

Close examination of the inevitable discovery cases reveals that there are three separate and distinct factual contexts in which the doctrine has been applied. The cases may be divided into those involving "independent inevitable discovery," "a hypothetical independent source," and "dependent inevitable discovery." This case presents "independent inevitable discovery," by far the strongest factual context in which to repulse any invasion of the factfinding process by costly extension of the exclusionary rule.

When "independent inevitable discovery" is utilized, lawfully obtained leads totally independent of collateral illegal conduct are in fact being aggressively pursued by law enforcement. In this narrow class of inevitable discovery cases, courts are not asked to speculate about whether police would have actually launched the legitimate investigative efforts because the record shows that such activity had in fact been initiated. In the "independent inevitable discovery" context, separate and distinct lines of police activity are racing toward discovery of evidence related to the crime. If the legal techniques uncover the evidence before the unlawful investigative efforts, the independent source rule applies. If, on the other hand, the unlawful efforts reach the evidence first inevitable discovery is applicable upon a showing by a preponderance of evidence that law enforcement would have discovered the underlying evidence in any event through lawful efforts.[4]

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[4]See e.g., *United States v. Romero*, 692 F. 2d 699, 703-04 (10th Cir. 1982) (illegal *Terry*-type search occurs just prior to independent determination of probable cause to arrest subject and conduct search incident to arrest); *United States v. Brookins*, 614 F. 2d 1037, 1044-49 (5th Cir. 1980) (identification of accomplice in crime imminent through lawful means notwithstanding illegal interrogation).

This case presents a solid example of "independent inevitable discovery." Two unrelated lines of investigation were being pursued simultaneously by Iowa law enforcement officials. The discovery of articles of clothing at a rest area along Interstate 80 at Grinnell, 60 miles from Des Moines, caused police to theorize that the body may have been disposed of along Interstate 80 somewhere between Grinnell and Des Moines. Transcript of Motions to Suppress Evidence at 35-36 (Joint App. at 33). Detective Ruxlow, directing 200 volunteers in a thorough, painstaking search in central Iowa, was on the verge of lawfully discovering the body of Pamela Powers. Tr. at 34 (Joint App. 31). The Ruxlow group had scoured the roadsides and culverts approximately seven miles each side of Interstate 80 for a distance of over forty miles, and had reached a spot only two and a half miles from the culvert where the girl's body rested. Tr. at 35-43 (Joint App. 32-36). While this lawful and exhaustive search was underway, Detective Leaming engaged in the now famous conversation with Williams which was later determined by this Court to be unconstitutional. At a time when discovery of Pamela Powers' body by Ruxlow and his volunteers was imminent, Williams agreed to lead officials to the body. The legal search, which the trial court found would have otherwise continued, was terminated.[5]

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[5]According to the state trial court, "the searchers would have arrived at the site of the body within a short time of its actual finding, had they continued the search after dark. . . . Had the searchers stopped due to the snow and the dark the next day was a Friday and a weekend was upcoming—the search would clearly have been taken up again where it left off, given the extreme circumstances of the case and the body would have been found in short order." *See Ruling on Motions to Suppress* at 5 (Joint App. at 86). Moreover, with re-

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Where two independent lines of inquiry are converging on the same evidence, the so-called inevitable discovery exception represents a conventional variant of the well-accepted independent source rule. In this context, the inevitable discovery exception merely stands for the common sense principle that vagaries of timing of discovery will not defeat introduction of evidence that would otherwise clearly be admissible under the independent source rule announced in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920), and its progeny.

In a small minority of cases, the doctrine of inevitable discovery has been criticized.[6] Where the approach has been questioned, however, it has been when the prosecution asks the court to either (1) engage in far reaching speculation as to what kind of investigation law enforcement officials *might* have launched in the future had the illegality not occurred, or (2) to reconstruct a single, continuous illegal course of conduct in a legal fashion. In these cases, no independent investigative activity is literally on the verge of discovery of the challenged evidence.

The first group of occasionally criticized cases apply what might be called a "hypothetical independent source" approach to inevitable discovery. Again, no independent inquiry has actually been undertaken which may sever the linkage between the illegal conduct and the tainted evidence in these cases. Instead, the court is forced to

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spect to the testimony of Detective Ruxlow, the Court noted that he "impressed the Court as an intelligent and organized man with experience in the area of searches." *Id.* at 3 (Joint App. at 85).

[6] *See, e.g., United States v. Villareal*, 565 F. 2d 932, 941-42 (5th Cir. 1978) (Wisdom, J., dissenting); *United States v. Griffin*, 502 F. 2d 959 (6th Cir. 1974); *United States v. Paroutian*, 299 F. 2d 486, 489 (2d Cir. 1962).

project how law enforcement would have behaved in the future had the unlawful conduct not occurred.[7] While the vast majority of "hypothetical independent source" cases project routine police investigative techniques in an unquestionable fashion,[8] the approach, if improperly handled, can involve rather extreme speculation. In one unusual case, it was assumed that law enforcement officers would have painstakingly searched through thousands of consignment documents in the hands of almost a hundred import brokers in the area of an alleged crime to uncover the same evidence seized in an unlawful search.[9]

In the case at bar, however, the State has not asked the courts to engage in undisciplined soothsaying. There is no question as to what kind of law enforcement investigation "might" have been launched in the future had the underlying illegality not occurred. Indeed, it is undisputed that a massive search for Pamela Powers involving hundreds of persons was in fact initiated and was progressing directly toward the area where Pamela Powers' body was ultimately found. Criticism of the more ex-

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[7]*See United States v. Crews*, 445 U. S. 463, 475 n. 22 (1980).

[8]*See, e.g., United States v. Wilson*, 671 F. 2d 1291, 1293-94 (11th Cir. 1982) (letter threatening President sent to the White House would have inevitably been discovered and forwarded to appropriate officials notwithstanding examination of outgoing mail); *United States v. Bienvenue*, 632 F. 2d 910, 914 (1st Cir. 1980) (evidence of travel to Columbia by husband of wife arrested in Florida for conspiracy to import cocaine that was seized in unlawful search of home would have been discovered through routine police procedures because officers knew the husband had previously travelled to Columbia through an unnamed travel agency in Manchester prior to illegal search); *United States ex rel. Owens v. Twomey*, 508 F. 2d 858, 866 (7th Cir. 1974) (key witness whose name and address were known to police prior to illegal search would have been discovered anyway through routine procedures even though she was actually found at a work address unlawfully obtained from defendant).

[9]*United States v. Falley*, 489 F. 2d 33, 40 (2d Cir. 1973).

treme "hypothetical independent source" cases as unduly speculative application of inevitable discovery has no force here where independent investigative techniques were actually underway which the trial court found would have discovered the challenged evidence had the illegal conduct not occurred.[10]

Resort to inevitable discovery theory also sometimes occurs in an effort to engage in after the fact repair of unlawful conduct. Since no actual or even hypothetical independent avenue of discovery is present, these cases may be labeled "dependent inevitable discovery." Admission of the evidence concededly causally depends on conduct found to be illegal. The court, however, is asked to undo the transaction and reconstruct it in a legal fashion. For instance, in one case, the government sought to allow admission of evidence discovered as a result of an unlawful warrantless search on the ground that agents planned to obtain a warrant for which they had adequate probable cause. Since the agents could have gotten a warrant, the court was asked to treat the transaction as if they had in fact obtained a warrant.[11]

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[10]This case also presents a comparatively nonspeculative "hypothetical independent source" alternate ground for admission of the evidence. Williams' first attorney, McKnight, had told him that he would ultimately have to lead police to the body. Williams, in his initial statements to Leaming, told him that he would tell everything once he saw his lawyer in Des Moines. This set of circumstances led Justice Marshall to conclude that Leaming sought to avoid that result, which could cloak the fact that Williams provided the information about the girl's whereabouts in attorney-client privilege. *See Brewer v. Williams,* 430 U. S. at 408 (Marshall J., concurring). It could thus be concluded that Williams would have provided information with respect to the body to McKnight, who would have told police. This alternative theory of inevitable discovery was recognized by the state trial court. *See Ruling on Motions to Suppress* at 6 (Joint App. 87-88).

[11]*United States v. Griffin,* 502 F. 2d 959 (6th Cir. 1974).

While the federal courts have been most receptive to other applications of inevitable discovery, they have been allergic to the constitutional salvage efforts in the dependent inevitable discovery cases. If inevitable discovery may be invoked to admit evidence illegally obtained on the ground that a warrant could have in fact been obtained, the requirement to present probable cause to a magistrate *first* would be substantially eviscerated. Indeed, in strong cases, a warrant simply would not be required.[12]

In the present case, however, no evisceration of constitutional requirements will occur. Here, an independent line of inquiry is converging on the evidence. Moreover, all evidence that was obtained solely as a result of the illegal activity—namely, evidence showing that Williams in fact led officers to the body and incriminating statements made by Williams—has been suppressed. Thus, the deterrent function of the exclusionary rule has been fully maintained in this case.[13]

In conclusion, the inevitable discovery exception to the exclusionary rule as applied in this case is entirely

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[12]As the Court emphasized in *United States v. Griffin*, "The assertion by police . . . that the discovery was 'inevitable' because they planned to get a search warrant and had sent an officer on such a mission, would as a practical matter be beyond judicial review. Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment." 502 F. 2d at 961; *see also United States v. Paroutian*, 299 F. 2d 486, 488 (2d Cir. 1962).

[13]Indeed, in this case, the state trial court judge rejected an effort by the prosecution to introduce evidence obtained through a warrantless search of Williams' room at the YMCA on December 24, 1968. Although a warrant was obtained the next day, Judge Denato refused to admit the evidence. According to the court, "the fact that probable cause was present all along and would have been likewise adequate on 12-24-68 cannot be held to validate the reentry with a search warrant after the prior, warrantless search was conducted." *See Ruling on Motions to Suppress* at 9-10 (Joint App. at 90-91).

consistent with this Court's precedents. *Nardone v. United States*, 308 U. S. 338 (1939); *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920). No extraordinary speculation as to what might have occurred is required, and no substantive requirement of criminal law is defeated by the application here. Moreover, since substantial evidence has already been suppressed, the deterrence purposes of the exclusionary rule have been fully served. Under the facts and circumstances presented here, inevitable discovery is a sound doctrine that properly balances the need to deter unlawful police conduct against the requirements of effective law enforcement.[14]

B. A showing of lack of bad faith on the part of police officers is not required to invoke the inevitable discovery exception to the exclusionary rule.

The vast majority of inevitable discovery cases contain no discussion of the question of whether police offi-

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[14]Petitioner recognizes the view that the exclusionary rule enables "the judiciary to avoid the taint of partnership in official lawlessness" and assures the people "that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." *United States v. Calandra*, 414 U. S. 338, 357-58 (1974) (Brennan, J., dissenting). The Petitioner believes, however, that exclusion of highly probative and reliable evidence that police demonstrably would have discovered anyway through lawful means fifteen years after a notorious crime would more seriously undermine popular trust in government than would its admission. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 737-38 (1970). While preservation of judicial integrity may have a limited role in determining whether the exclusionary rule should apply in a particular context, *Stone v. Powell*, 428 U. S. at 485, it has no applicability under the facts here. *Cf. United States v. Crews*, 445 U. S. 463 (1980) (exclusionary rule does not require suppression of identification notwithstanding actual use of illegally obtained photograph).

cers acted with an absence of bad faith.[15] Indeed, a number of cases utilize inevitable discovery in the context of clearly illegal police conduct, at least raising the implication that the question is irrelevant.[16] The Petitioner believes that where the body of a murder victim—highly probative and reliable evidence relating to the guilt or innocence of the accused—would have been imminently discovered by legitimate law enforcement activity independent of illegal conduct, the State should not be required to demonstrate absence of bad faith. Under these circumstances, the only question is the causal con-

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[15]The footnote in *Brewer v. Williams*, which discusses inevitable discovery contains no mention of the issue, nor is absence of bad faith considered in *Killough v. United States*, 119 U. S. App. D. C. 10, 336 F. 2d 929 (1964), the case cited by this Court in the note. 430 U. S. at 406 n. 12.

[16]*United States v. Romero*, 692 F. 2d 699, 703 (10th Cir. 1982) (agent testified that he knew object in suspect's pants was not weapon, but seized it anyway in direct violation of *Sibron v. New York*, 392 U. S. 40, 65-66 (1968)); *United States v. Kandik*, 633 F. 2d 1334, 1336 (9th Cir. 1980) (inevitable discovery invoked notwithstanding use of information obtained in plea bargaining session in clear violation of Fed. R. Crim. P. 11(e)(6)); *United States v. Bienvenue*, 632 F. 2d 910, 914 (1st Cir. 1980) (inevitable discovery applied where warrantless search of defendant's apartment without exigent circumstances); *United States v. Brookins*, 614 F. 2d 1037, 1044-49 (5th Cir. 1980) (accused, in custody for 72 hours without presentment to magistrate, told that law enforcement were "not interested in you" and comments would be "off the record"); *United States v. De Marce*, 513 F. 2d 755, 758 (8th Cir. 1975) (inevitable discovery invoked notwithstanding 80-hour delay in presenting juvenile suspect to magistrate after arrest); *United States v. Cole*, 463 F. 2d 163, 174 (2d Cir. 1972) (inevitable discovery applied where unauthorized wiretap deserves the "sharpest condemnation"); *see also United States v. Allen*, 436 A. 2d 1303, 1309 (D. C. App. 1981) (inevitable discovery applies notwithstanding clear violation of *Dunaway*); *Martin v. State*, 433 A. 2d 1025, 1031 (Del. 1980) (inevitable discovery applied even though state concedes unconstitutionality of search); *State v. Allies*, 606 P. 2d 1043, 1052-53 (Mont. 1979) (heavy coercion including truth serum and "Mutt and Jeff" approach to interrogation, yet inevitable discovery applies).

nection between the body and the underlying constitutional infraction can be severed through application of the inevitable discovery doctrine.[17]

This Court has not required a showing of absence of bad faith in applying the independent source rule. Indeed, as with the inevitable discovery cases, the independent source rule is often invoked where there are rather clear constitutional violations that tend to negate the proposition that police officers acted in good faith.[18] For instance, in *United States v. Crews*, 445 U. S. 463 (1980), the suspect was arrested without probable cause, ostensibly because he was a suspected truant, apparently in or-

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[17]Because the absence of bad faith issue was not subject to evidentiary proceedings in state or federal trial courts and received only perfunctory mention in briefs before the Court of Appeals, see Joint Appendix at 181-87, counsel for the state was surprised when the issue emerged from the bench at oral argument. In the petition for rehearing, Petitioner urged consideration of whether absence of bad faith is required notwithstanding commentary of counsel at oral argument that the Court construed as concessions on the issue. In denying rehearing, the Court of Appeals, while noting "concessions" of counsel, proceeded in the alternative to hold, on the merits, that a showing of absence of bad faith is required in order to invoke the inevitable discovery exception to the exclusionary rule. *Williams v. Nix*, 700 F. 2d at 1174. Since the Court of Appeals ruled on the issue in denying rehearing, the Petitioner believes the issue is properly before the Court.

[18]Respondent appears to rely heavily on *Brown v. Illinois*, 422 U. S. 590 (1975), for the proposition that a showing of absence of bad faith is required here. *See* Respondent's Opposition to Certiorari at 7-12. But *Brown* is not a case involving inevitable discovery or its close legal relative, the independent source rule. Rather, *Brown* involves the analytically distinct attenuation exception to the exclusionary rule. Since there is no real or hypothetical independent route to the discovery of evidence in attenuation cases, "flagrancy" of police conduct is a factor to be considered in determining whether the connection between challenged evidence and illegality is sufficiently remote to allow its admission. *Brown* has no application where an independent source severs the "but for" relationship between the underlying illegality and the challenged evidence.

der to obtain a photograph for use in an assault and robbery investigation. 445 U. S. at 463. This Court, however, did not consider the bad faith issue in applying the independent source rule to a subsequent in-court identification of the suspect by the victim.[19]

Similarly, in cases where false information is contained in affidavits filed in support of a search warrant, the fact that the material may have been submitted in bad faith is not dispositive. In *Franks v. Delaware,* 438 U. S. 154 (1978), this Court held that where sufficient content in a warrant affidavit supports probable cause after false material is disregarded, the warrant is valid. 438 U. S. at 172. The tainted portions of the warrant do not bleach the truthful material when independently considered. *See also Kastigar v. United States,* 406 U. S. 442, 460 (1972) (only inquiry in severing evidence from prosecutorial guarantee of immunity is causal in nature).

Any rule to the contrary would have serious consequences for the administration of criminal justice. If a showing of absence of bad faith were required every time the independent source rule or inevitable discovery were raised, criminal proceedings could turn on the elusive state of mind of law enforcement officers rather than on the guilt or innocence of the accused.[20] The courts would continually be grappling with such questions as how much constitutional law the officers knew or should have known at the time of the alleged infraction. As has been observed in a similar context, "Sending state and federal courts

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[19]The Court in *Crews* discusses motivation for the arrest in a brief footnote that does not directly consider the good faith issue. 445 U. S. at 468 n. 5.

[20]Leaming's statements and actions have been subject to painstaking scrutiny even in law review commentary. *See* Kamisar, *Forward: Brewer v. Williams—A Hard Look at a Discomforting Record,* 66 Geo. L. J. 201 (1977).

into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." *Massachusetts v. Painten*, 389 U. S. 560, 565 (1968) (White, J. dissenting); *United States v. Peltier*, 422 U. S. 531, 560-61 (1975) (Brennan, J., dissenting). Certainly neither constitutional nor prudential considerations require such an awkward result.

Limiting the inquiry in inevitable discovery and independent source contexts to causation does not eviscerate the exclusionary rule. The State is still required to show what amounts to an "independent, legitimate source" for disputed evidence, a requirement which this Court, in a similar context, has characterized as "a substantial protection" against abuse. *See Kastigar v. United States*, 406 U. S. 441, 461 (1972) (use immunity). Any evidence that has been obtained by illegal means which would not inevitably or independently have been discovered is still subject to its bite. Indeed, in this very case, the prosecution has already been deprived by operation of the exclusionary rule of evidence of the most probative character, namely, incriminating statements by Williams to Leaming, and the fact that Williams led police to the body.[21]

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[21]For other inevitable discovery cases where evidence only discoverable through illegal conduct is suppressed, see *Papp v. Jago*, 656 F. 2d 221 (6th Cir. 1981) (confession obtained in violation of *Miranda* excluded, but body of victim introduced as corpus delecti under inevitable discovery); *United States v. Kandik*, 633 F. 2d 1334 (9th Cir. 1980) (plates and counterfeiting paraphernalia suppressed, though testimony about operation from co-conspirators admitted); *United States v. Brookins*, 614 F. 2d 1037 (5th Cir. 1980) (results of "consent search" and incriminating statements obtained after 72 hour detention without presentment to a magistrate suppressed, but name of associate in crime, obtained while accused illegally restrained admitted on ground that it would have been discovered anyway); *United States v. De Marce*, 513 F. 2d 755 (8th Cir. 1975) (confession result of 80-hour detention without presentment to

(Continued on next page)

Exclusion of this important evidence amply satisfies the legitimate appetite of the exclusionary rule. As this Court recognized in *Michigan v. Tucker,* 417 U. S. 433 (1974), deterrence is not significantly augmented once evidence directly obtained as a result of unlawful conduct has been suppressed. 417 U. S. at 448.

To allow police misconduct to taint the inevitable fruit of legitimate law enforcement activity in the interest of obtaining another ounce of dubious deterrence in the name of an expanded exclusionary rule would be far too Carthaginian on the prosecution. Suppression of evidence relating to the body of Pamela Powers and its condition would run afoul of this Court's frequent admonition that the exclusionary rule should be applied sparingly with due regard for society's interest in effective law enforcement. *See Stone v. Powell,* 428 U. S. at 488-89; *Michigan v. Tucker,* 417 U. S. at 446; *United States v. Calandra,* 414 U. S. at 348. Even a bad faith error by a police officer, reprehensible as it may be, should not immunize a defendant from prosecution for a heinous crime. This Court's observation that enforcement of criminal law is "not a game to be checkmated by error," *McGuire v. United*

(Continued from previous page)

magistrate suppressed, but .22 caliber gun admitted on inevitable discovery theory); *Government of Virgin Island v. Gereau,* 502 F. 2d 914 (3d Cir. 1974) (incriminating statement regarding gun given by defendant pursuant to unlawful arrest suppressed, but gun found in vicinity of massive search in progress admitted on inevitable discovery theory); *United States v. Cole,* 463 F. 2d 163 (2d Cir. 1972) and *United States v. Schipani,* 414 F. 2d 1262 (2d Cir. 1969) (evidence that resulted only from illegal wiretap not suppressed, though other evidence that would have been discovered admitted under inevitable discovery); *Wayne v. United States,* 318 F. 2d 205 (D.C. Cir. 1962) (medication, its container, and cash in search for person allegedly killed by illegal abortion suppressed, but gun found in vicinity of massive search in progress admitted on inevitable discovery theory).

States, 273 U. S. 95, 99 (1927), is applicable here regardless of the character of the unconstitutional conduct.[22]

II. Even if a showing of absence of bad faith is required before the inevitable discovery exception to the exclusionary rule may be invoked, the Court of Appeals erred in finding the State failed to show lack of bad faith.

Conceding arguendo that the State must show an absence of bad faith before the inevitable discovery exception to the exclusionary rule may be invoked, the Petitioner believes that the Court of Appeals committed error when it held that the State failed to meet its burden on the issue. In Petitioner's view, the Court of Appeals applied an incorrect legal standard to undisputed facts in this case. In the alternative, the Petitioner believes the Court erred in finding the State could not show absence of bad faith when the question has not been the subject of an evidentiary hearing in state or federal court.

A. The Petitioner met its burden in demonstrating that police officers acted without bad faith.

After scouring this Court's previous opinion in *Brewer v. Williams*, the Court of Appeals concluded that the State could not show that Detective Leaming acted with an absence of bad faith. The Court emphasized this Court's prior conclusions that Leaming's conduct was undertaken "deliberately," "designedly," and "purposely." 430 U. S. at 399.[23] This is no doubt true in a general sense given

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[22]The exclusionary rule, of course, is not the only available mechanism to deter bad faith conduct by police. An officer who engages in egregious constitutional violations is subject to internal police sanctions. In addition, an officer acting in bad faith is subject to liability under 42 U. S. C. § 1983 even if the plaintiff pleads guilty on the underlying criminal charge. *See Haring v. Prosise*, 51 U. S. L. W. 4736 (U. S. June 13, 1983) (No. 81-2169).

[23]*Nix v. Williams*, 700 F. 2d 1164, 1171 (8th Cir. 1983).

Leaming's testimony in the first trial suppression hearing.[24]

But the question here is not whether Leaming intended his statement to elicit a response from the accused. Even if a showing of absence of bad faith is required in order to invoke the inevitable discovery exception to the exclusionary rule, the fact that Leaming generally intended to further the investigation is irrelevant.[25] In Petitioner's view, any limitation on inevitable discovery based on character of police conduct, should apply only where constitutional violations are so egregious that the spectacle of continued prosecution of the accused simply cannot be tolerated. *Rochin v. California*, 342 U. S. 165 (1952).

Application of this admittedly stringent standard in this case to allow admission of the challenged evidence would not require this Court to harken back to less celebrated days of American criminal justice. Rather, the approach would simply recognize the blunt facts of this case: (1) the body has been discovered, (2) the body's physical condition demonstrates without peradventure that a brutal murder has occurred, (3) the underlying constitutional infraction that led law enforcement officers to the body is technical in nature, (4) law enforcement has al-

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[24]See *Brewer v. Williams*, 430 U. S. at 399.

[25]In 42 U. S. C. § 1983 context, this Court has expressly rejected the proposition that intentional conduct that violates constitutional rights is *per se* a showing of bad faith. *See Baker v. McCollen*, 443 U. S. 137 (1979) (officials not liable for eight-day incarceration of suspect's brother resulting from misidentification). *Baker*, of course, involves mistake of fact, rather than of law, but this is a distinction without a difference considering the need to allow breathing room for public officials is equally required in either context.

ready paid a stiff price for the unlawful police conduct through traditional operations of the exclusionary rule, and (5) since the body would have been discovered in any event by lawful means, no insult to the integrity of the criminal justice system occurs through admission of evidence relating to the body.

Respondent looks to cases construing liability of public officials under 42 U. S. C. § 1983 for guidance on the issue of proper standard regarding any absence of bad faith requirement that might somehow be grafted on to the inevitable discovery doctrine. *See* Respondent's Opposition to Certiorari at 14. Even though these cases generally do not directly implicate the strong public interest in effective criminal prosecution, this Court has repeatedly expressed the concern that too harsh a review of the actions of public officials could deter their willingness to execute their responsibilities with decisiveness and without undue timidity. *Wood v. Strickland,* 420 U. S. 308, 321 (1974); *Scheuer v. Rhodes,* 416 U. S. 232, 240 (1974). As a result, this Court has held in the section 1983 context that public officials do not act in bad faith unless it can be shown that "the constitutional right allegedly infringed by them was *clearly* established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm." *Procunier v. Navarette,* 434 U. S. 555, 563 (1977) (emphasis supplied).

The policy concerns expressed in *Scheuer v. Rhodes, Wood v. Strickland* and *Procunier v. Navarette* have force in the law enforcement context where rapid action is often critical to success. While it could be argued that some mechanism is necessary to deter police from unlawful

conduct, law enforcement officers are surely entitled to as much breathing room in the execution of their duties as are school administrators or prison officials.

Even applying Respondent's section 1983 test in a subjective fashion to the present case, it seems clear that the State has met whatever burden it might have had to show absence of bad faith. Plainly, any suggestion that Leaming actually knew his conduct was unconstitutional swims against heavy current. If Leaming had enough sophisticated legal knowledge actually to know in his own mind what this highly divided court would decide ten years after the fact, he surely would have also known that he was running a high risk of causing extremely important evidence to be excluded as "fruit of the poisonous tree" and that the entire prosecution of Williams could be jeopardized. Leaming would be an odd fellow indeed to have such a state of mind.

The record of Respondent's first trial, which Petitioner asks this Court to judicially notice, clearly indicates that Leaming had some sensitivity to the constitutional rights of the accused. Before departing on the trip from Davenport to Des Moines, Leaming read Williams his *Miranda* rights, stating, "I want you to remember this because we'll be visiting between here and Des Moines." *Brewer v. Williams,* 430 U. S. at 392. Apparently trying to comply with the *Miranda* decision, Leaming was careful not to directly ask Williams questions. As Leaming told the accused, "I do not want you to answer me. I do not want you to discuss it further." *See* 430 U. S. at 393. While Leaming may later have been judged by a narrow majority in this Court to have crossed the constitutional line, evidence adduced at Respondent's first trial demon-

strates a desire on the part of Leaming to tailor his conduct to comply with what he thought were constitutional requirements.[26]

Leaming was also remarkably forthcoming at the suppression hearing at the first trial with respect to what occurred in the car between Davenport and Des Moines. Defense counsel did not have to pry testimony regarding the Christian burial speech out of a reluctant witness. He volunteered it in response to a general question. The transcript of the hearing[27] reads:

Q. (By Williams' attorney) You didn't ask Williams any questions?

A. No sir, I told him some things.

Q. You told him some things?

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[26]Petitioner has no desire to relitigate *Brewer v. Williams*. However, the assertion by Respondent that Leaming himself broke an agreement that he made with defense counsel, see Respondent's Opposition to Certiorari at 2, is without foundation in the record of either of Williams' trials. As Professor Kamisar notes, police overheard Williams' attorney, McKnight, tell Williams on the phone that he would not be questioned, and should not reveal anything, until he arrived in Des Moines. Apparently both the trial court and the federal district court concluded that by their *silence*, the Des Moines police agreed to "go along" with McKnight on this matter. Professor Kamisar rightly concludes that "there is no indication in the record that after McKnight concluded his phone conversation with Williams *anything* was said by McKnight or by the Des Moines police about not questioning Williams on the return trip. The record does not show an explicit agreement, or even that McKnight directly instructed Chief Nichols or Captain Leaming that Williams was not to be questioned on the return trip." When Kelly, Williams' Davenport lawyer, expressed his view of arrangements for travel, Leaming replied, "That isn't quite the way I understand it." *See* Kamisar, *Foreward: Brewer v. Williams—A Hard Look at a Discomforting Record*, 66 Geo. L. J. 209, 212-13 nn. 23-24 (1977), citing *Brewer v. Williams*, 430 U.S. 387 (1978), Joint App. at 38-41, 107.

[27]*See Brewer v. Williams*, 430 U. S. 387 (1978), Joint App. at 62-3. The transcript is cited in Kamisar, *Foreward: Brewer v. Williams—A Hard Look at a Discomforting Record*, 66 Geo. L. J. 209, 223 n. 65 (1977).

A. Yes, sir. Would you like to hear it?
Q. Yes.
A. All right. I said to Mr. Williams, I said, "Reverend, . . ." (Christian burial speech described).

Leaming's willingness, even eagerness, to testify in court with respect to the manner in which he was able to discover information about the whereabouts of the body of Pamela Powers is not consistent with the theory that Leaming "knew" he was acting unconstitutionally.

In addition, it cannot be maintained that Leaming reasonably should have known that his conduct was clearly unconstitutional. This Court's decision in *Brewer v. Williams* rested on an extension of the right to counsel as expressed in *Massiah v. United States*, 377 U.S. 201 (1964). But in *Massiah*, the accused was not aware that a police agent had infiltrated his inner circle. Here, Williams knew full well he was talking to a police officer. Of course, the majority in *Williams* ultimately ruled that the fact that *Massiah* did not know that his interrogator was a police officer was a distinction without a difference.[28] But Leaming cannot reasonably be charged with knowing in 1968 that this Court would apply *Massiah* to the facts presented ten years later. Indeed, ten years later, four members of the Court believed that such an extension was unwarranted.[29]

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[28]*But see* opinion of Justice Blackmun, who states "Massiah was more seriously imposed upon . . . because he did not know he was under interrogation by a government agent." *Brewer v. Williams*, 430 U. S. at 440 n. 3 (Blackmun, J., dissenting).

[29]The Court's failure to consider this distinction has been subject to critical commentary. *See* Note, *Brewer v. Williams: Express Waiver Extended to Sixth Amendment Right to Counsel*, 4 Ohio N. L. Rev. 833, 836 (1977).

While the decision in *Brewer v. Williams* did not rest on *Miranda* grounds, it cannot be maintained that Leaming as a reasonable police officer should have known that he was violating *Miranda*. Of course, *Miranda* had been decided two years before the transaction in question. But the *Miranda* opinion was narrowly focused on *interrogation* of the accused in custodial circumstances. Commentary following *Miranda* engaged in substantial speculation as to what exactly the court meant by interrogation.[30] As of the winter of 1968, no Supreme Court case had addressed the question.[31] Given the strength of the *Miranda* minority and the general reluctance of the Court to invoke *Miranda* in subsequent cases to overturn con-

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[30]See Bator & Vorenberg, *Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 Colum. L. Rev. 62, 67 (1966).

[31]The question of what is interrogation under *Miranda* was finally explored by this Court in *Rhode Island v. Innis*, 446 U. S. 291 (1980). In that case, the accused was suspected of armed robbery in which the assailant had brandished a sawed off shotgun. When passing a school with handicapped students while transporting the accused to the station, one officer remarked to another, "God forbid one of them might find a weapon with shells and they might hurt themselves." 446 U. S. at 294-95. The suspect then interrupted and volunteered to show officers the location of the gun. This Court held that the conversation between officers was not "reasonably likely" to elicit an incriminating response and thus was not interrogation under *Miranda*. 446 U. S. at 303.

The similarities between *Innis* and *Brewer* are obvious. Justice Stevens found that Innis's "invocation of his right to counsel makes the two cases indistinguishable." 446 U. S. at 310 n. 7. And, as Justice Marshall noted, "One can scarcely imagine a stronger appeal to the conscience of a suspect—*any* suspect—than the assertion that if a weapon is not found an innocent person will be hurt or killed." 446 U. S. at 405. The fine line between *Innis* and *Brewer* conclusively demonstrates that Leaming cannot be charged with knowledge that his actions violated *Miranda* strictures.

victions,[32] any belief that *Miranda* might not apply to the facts of this case cannot be characterized as unreasonable.[33]

While the above consideration of *Miranda* and *Massiah* barely explores the rich complexity of the legal issues involved, even this brief discussion represents a far more sophisticated analysis than can reasonably be expected of law enforcement officers in their day-to-day activity.[34]

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[32]The Court has generally avoided reversals of criminal convictions based on strict interpretation of *Miranda*. *See Michigan v. Tucker*, 417 U. S. 433 (1974); *Michigan v. Mosley*, 423 U. S. 96 (1975).

[33]As one commentator has said with respect to the questions of whether interrogation occurred and whether Williams waived his right to counsel, "The majority's resolution . . . can be disputed indefinitely, depending upon one's own view of the facts in the record." Note, *Brewer v. Williams*, 11 Creighton L. Rev. 997, 1029-30 (1970). Similarly, it has been said that "The Court . . . found itself thrust into the maze of defining 'interrogation' . . . ." Note, *The Right to Counsel and the Strict Waiver Standard*, 57 Neb. L. Rev. 543, 548 (1978). *See also* Note, *The Right to Counsel: An Alternative to Miranda*, 38 La. L. Rev. 239, 239-40 (1977), where it is observed, "One of the most difficult and controversial areas of American criminal procedure today is the subject of pre-trial police interrogation of an accused . . ."; Note, *Constitutional Law-Sixth Amendment Right to Counsel-Waiver*, 45 Tenn. L. Rev. 112, 113 (1977), "The case demonstrates in an intriguing factual context the complex relationship between the right to counsel, incriminating statements, or confessions made in the absence of counsel, and the concept of waiver of fundamental rights;" Note, *Brewer v. Williams: The End to Post-Charging Interrogation*, 10 Sw. U. L. Rev. 331, 331 n. 3 (1978), noting that following *Miranda*, "considerable confusion has arisen regarding the scope of the decision;" Note, *Interrogation and the Sixth Amendment*, 53 Ind L. Rev. 313, 313, (1978) (noting many cases upholding admissions without presence of an attorney).

[34]This Court has recognized the situational roles played by law enforcement officers. In *Imbler v. Pachtman*, 424 U. S. 409 (1976), the Court observed, "frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation." *Id.* at 425.

While police can be reasonably expected to know the basics of constitutional law, they should not be charged with the knowledge of trained lawyers when courts engage in post hoc judgment on whether they acted in bad faith. Thus, while a police officer who executes a warrantless search without any colorable justification acts so unreasonably that bad faith may be inferred, a far different situation exists where an officer obtains a warrant from a magistrate that is later found invalid through refined analysis of difficult questions of constitutional law. Similarly, while an officer who physically batters a handcuffed suspect acts so unreasonably that bad faith may be inferred, a failure to give or repeat *Miranda* warnings at precisely the right time can be a simple error in judgment.

Here, under the facts presented in this case, it cannot be said that Detective Leaming reasonably should have known that his conduct would ten years later be found unconstitutional by a narrow majority of this Court. As the unanimous opinion of the Supreme Court of Iowa noted:

> The issue of the propriety of the police conduct in this case . . . has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.[35]

In conclusion, the unlawful law enforcement activity in this case is far from being so egregious that prosecution of the accused should not be tolerated. Even applying Respondent's less stringent section 1983 test, there is no basis for concluding that those who engaged in the

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[35]State v. *Williams*, 285 N. W. 2d at 260-61.

unlawful conduct knew or should have known that the questioned activity was unconstitutional. As a result, Petitioner has met its burden of showing absence of bad faith.

B. Since the question of absence of bad faith has not been the subject of an evidentiary hearing in either state or federal trial courts, the Court of Appeals erred in concluding that the State could not prove absence of bad faith.

Even assuming that the inevitable discovery exception requires a finding of absence of bad faith on the part of police officers, and even further assuming that absence of bad faith cannot be conclusively established by Petitioner at this stage of the proceeding, the Court of Appeals' decision remains infected with reversible error. Because the absence of bad faith issue has not been the subject of an evidentiary hearing in either state or federal trial courts, the Court had no basis for concluding that the Petitioner, as a matter of law, could not prove absence of bad faith.

The question of absence of bad faith was not raised in the state court suppression hearing at Williams' second trial. *See* Transcript of Motions to Suppress Evidence, pp. 3-90; (Joint App. 1-82), Ruling on Motions to Suppress Evidence, pp. 1-12 (Joint App. 82-93). The entire focus of the hearing was on whether the body of Pamela Powers actually would have been discovered by searchers, and if so, whether her physical condition would have been preserved. The Iowa Supreme Court injected the absence of bad faith issue into this case when it announced a "two pronged" inevitable discovery test.

In the habeas proceeding in the Federal District Court, Respondent did not properly raise the absence of bad faith issue. His pleadings did not mention it directly or in-

directly. While Respondent's Memorandum in Support of Petition cites *Brown v. Illinois*, 422 U. S. 590 (1975), the discussion of this "attenuation" case makes no reference at all to the Iowa Supreme Court's application of the absence of bad faith prong.[36] In citing *Brown*, Respondent appears only to be arguing that no inevitable discovery exception exists and that the case should be tested along the "attenuation" standards of *Brown*, a legal analysis not adopted by the Iowa court. While the State put on no evidence on the absence of bad faith issue in

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[36]The discussion of *Brown* is contained in a section of Respondent's Memo entitled "The 'Inevitable Discovery' Test Applied by the State Courts was Constitutionally Impermissible." This section amounted to a *facial* challenge to the two-pronged test developed by the Iowa Supreme Court. The argument was that the exception as developed by the Iowa Supreme Court would be "wholly inconsistent with the decisions of the United States Supreme Court concerning the Fifth and Sixth Amendment and the 'fruit of the poisonous' tree doctrine." Memorandum in Support of Petition at 21. Continuing the attack, the Respondent states that "contrary to the Iowa Supreme Court's characterization of this hypothetical test as an 'extension of the independent source exception to the rule of exclusion,' 285 N. W. 2d at 526 n. 3, the adoption of this theory "mark[s] a sharp break with *Silverthorne, Nardone*, and *Wong Sun*." Memorandum at 22. The discussion continues that "the problem with the 'inevitable discovery' test applied *by the trial court is* . . . that it emasculates the exclusionary rule." Memorandum at 23 (emphasis added).

Having apparently demolished inevitable discovery on its face, the Respondent then purports to apply "the constitutionally appropriate fruit-of-the-poisonous tree standards to the instant case." Memorandum at 24. It is "[i]n this regard" that *Brown v. Illinois*, 422 U. S. 590 (1975), is "especially instructive." Memorandum at 25.

In concluding the section, the Respondent notes that "Since the 'inevitable discovery' doctrine applied *by the state courts* was constitutionally impermissible, *their findings* that the body and the evidence derived therefrom *would have been discovered* even in the absence of the flagrant Fifth and Sixth Amendment violations in this case are constitutionally irrelevant." Memorandum at 26.

See generally Joint App. 173-177.

the District Court (or in state court), this fact was not discussed in Respondent's Post Trial Memorandum. *See* Pet. Reply App. at 13-44. The Federal District Court made no findings on the alleged issue, and the Respondent did not move to enlarge findings of fact pursuant to Fed. R. Civ. P. 52b. Respondent's position on this procedural issue, *see* Respondent's Opposition to Certiorari at 6-7, thus amounts to the paradox that the absence of bad faith issue was actually litigated, even though the main participants did not realize it. Under these circumstances, the general rule that questions not litigated below will not be considered on appeal is fully applicable.[37]

Even assuming Respondent's elliptical reference to *Brown v. Illinois* can be interpreted as preserving the issue for appeal, the procedural posture of the absence of bad faith question simply does not allow definitive adjudication of the issue *against* Petitioner under any circumstances. If this Court believes there is any legal doubt on the absence of bad faith question, the Petitioner is at least entitled to one evidentiary opportunity on the ques-

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[37] *See, e.g., Brown v. United States*, 411 U. S. 223, 229, 230 n. 4 (1973) (new arguments with respect to standing and constructive possession in Fourth Amendment context not considered); *Chiarella v. United States*, 445 U. S. 222, 235-37 (1980) (refusal to affirm securities law conviction on theory of liability not presented to jury). It is true that before the Court of Appeals in this case, Petitioner did not originally expressly claim that the absence of bad faith issue was improperly before the Court. *Williams v. Nix*, 700 F. 2d at 1175. Petitioner forcefully presented this argument in his petition for rehearing and rehearing en banc after the original panel issued its decision. *See generally*, 700 F. 2d at 1175 (Fagg, J., dissenting from denial of rehearing en banc).

The absence of bad faith issue was fleetingly mentioned in the briefs before the Court of Appeals, but was not substantially explored by either party. See Brief for Appellant at 24 (Joint App. at 182), Brief for Appellee, pp. 21-22 (Joint App. at 186-87).

tion in light of Respondent's procedural default in state and federal trial courts. *See Williams v. Nix*, 700 F. 2d 1164, 1175-76 (8th Cir. 1983) (Fagg, J., dissenting from denial of rehearing en banc).

Appellate restraint seems particularly appropriate in a habeas corpus proceeding where interests in finality and repose and comity between state and federal systems are unusually strong. There is, in Petitioner's view, serious doubt as to whether the question adjudicated by the Court of Appeals can be raised *at all* in a habeas attack. *Cf. Stone v. Powell*, 428 U. S. 465 (1976). *See* discussion under Part III, *infra*. Plainly, the aggressive posture of the Court of Appeals cuts roughly across the grain of this Court's recent cases urging an exceedingly cautious approach to exercise of federal habeas jurisdiction. *Engle v. Issac*, — U. S. —, 102 S. Ct. 1558 (1982); *Rose v. Lundy*, — U. S. —, 102 S. Ct. 1198 (1982); *Wainwright v. Sykes*, 433 U. S. 465 (1977). Under these circumstances, the State should not be forced to initiate a full blown trial fifteen years later, absent crucial evidence, where a limited hearing may be sufficient to resolve any residual doubts that may exist with respect to admissibility of the challenged evidence. *See United States v. Wade*, 388 U. S. 218, 242 (1967); *Jackson v. Denno*, 378 U. S. 391-96 (1964).

III. The rule in Stone v. Powell should be extended to inevitable discovery cases where highly probative and reliable evidence is challenged in a habeas proceeding after a full and fair opportunity to challenge the admissibility of the evidence on direct review in state court.

This case also squarely raises the important question of the applicability of the rule of *Stone v. Powell*, 428 U. S. 465 (1977), to non-Fourth Amendment cases involving ad-

missibility of highly probative and reliable physical evidence. The Court of Appeals dismissed the argument, noting erroneously that this Court "necessarily rejected" extension of *Stone* in *Brewer v. Williams*. *Williams v. Nix*, 700 F. 2d at 1170 n. 8 (Pet. App. 11). The issue, however, was expressly left open when this case was previously before the Court. *Brewer v. Williams*, 430 U. S. at 414 (Powell, J., concurring). One other case is presently before the Court which raises the issue of extension of *Stone* to non-Fourth Amendment cases. *White v. Finkbeiner*, 687 F. 2d 885 (7th Cir. 1982), *petition for cert. filed sub. nom. Fairman v. White*, 51 U.S.L.W. 3001 (U. S. June 18, 1982) (No. 81-2340).

The entire rationale of *Stone v. Powell* applies with full force to this Sixth Amendment case where the inevitable discovery exception is invoked to allow admission of highly probative and reliable physical evidence. Police will be adequately deterred by the possibility of losing convictions on direct appeal. The marginal deterrence value of relitigating the issue on collateral attack is minimal. And the interest in promoting finality in criminal judgments will be promoted. *See Stone v. Powell*, 428 U. S. at 492-94.

The reason *Stone v. Powell* has not been generally applied outside the Fourth Amendment is not because Fifth and Sixth Amendment violations should be categorically excluded from its reach because of some abstract reason or because the Fifth and Sixth Amendments are more highly placed in the constitutional hierarchy. Rather, Fifth and Sixth Amendment violations are generally not linked with highly probative and reliable physical evidence that nearly universally characterizes Fourth Amendment search and seizure cases. The Petitioner believes the

focus of the analysis in applying *Stone* should be on the nature of evidence gathered, not the type of constitutional violation which occurred.

The issue presented here is thus not whether *Stone v. Powell* applies to all cases where the right to counsel has been infringed. There may be occasions, for instance, where impairment of the right to counsel not involving admission of highly reliable evidence so undermines the fundamental fairness of the criminal proceeding that federal courts should not lightly relinquish their habeas jurisdiction. Here, however, the issue may even be narrowed to whether *Stone v. Powell* should be extended to non-Fourth Amendment claims where highly probative and reliable physical evidence has been obtained, or would have inevitably been obtained, through investigative means independent of the unlawful conduct.

Analytically, consideration of whether probative and reliable physical evidence is admissible under the inevitable discovery exception to the exclusionary rule is not much different from a challenge to the admissibility of evidence on Fourth Amendment grounds. In the Fourth Amendment context, the state court generally holds a suppression hearing, taking evidence and hearing argument on the question of whether a warrant is supported by probable cause or, in the alternative, whether a warrantless search is justified under the facts and circumstances presented. This inquiry is not qualitatively different from that which occurs when inevitable discovery is invoked. In the inevitable discovery setting, the state court takes evidence and hears argument on the question of whether law enforcement officials in fact would have inevitably discovered evidence through independent means that would be otherwise considered "fruit of the poisonous tree." Neither inquiry implicates the integrity of the

factfinding process. Neither inquiry involves an adjudication of fundamental rights.

The case is distinguishable from those concerning the suppression of confessions allegedly obtained in violation of *Miranda v. Arizona*, 384 U. S. 436 (1966), to which *Stone v. Powell* might also be extended.[38] Unlike here where physical evidence is at issue, introduction of communicative evidence obtained from the accused in violation of *Miranda* may, depending on the context, affect the fairness and accuracy of the criminal process. And, also unlike this case, litigants in *Miranda* cases might conceivably transform their challenge from a comparatively narrow attack on whether *Miranda* strictures were followed into a more broadly based assault on the voluntariness of their confession, thereby reopening the door to the federal courthouse. *White v. Finkbeiner, supra*, 687 F. 2d at 892-93.

Nothing in *Rose v. Mitchell*, 443 U. S. 545 (1978), is to the contrary. In this case, the Court refused to extend *Stone v. Powell* to claims of discrimination in the selection of a grand jury. The Court doubted that a full and fair hearing of the claim would be available in state courts since the appointing trial court would initially decide the merits of the claim. 443 U. S. at 561. Further, the Court noted a constitutionally protected right was at stake, not a judicially created remedy. 443 U. S. at 562. Finally, the Court noted that, unlike in *Stone*, "the deterrent effect of federal review is likely to be great, since state officials . . . may be expected to take note of a federal court's determination that their procedures are un-

[38]See *White v. Finkbeiner*, 687 F. 2d 855 (7th Cir. 1982), *petition for cert. filed sub nom. Fairman v. White*, 51 U. S. L. W. 3001 (U. S. June 18, 1982) (No. 81-2340).

constitutional and must be changed." 443 U. S. at 563. None of those distinguishing features are present in the case at bar.

The Respondent had a full and fair opportunity to litigate the admissibility of Pamela Powers' body in state court. In the District Court, Respondent urged that previously overlooked photographs and recent deposition testimony of the investigative officer contradicted the state court's findings. *See Williams v. Nix*, 528 F. Supp. at 670-71. But, as the District Court noted, "this newly discovered evidence neither adds much to nor subtracts much from the suppression hearing." 528 F. Supp. at 671 n. 6. Notwithstanding this evidence, according to the District Court:

> ... Pamela Powers' body would soon have been found by the searchers in essentially the same condition it was in at the time of the actual discovery, even if petitioner had not made any statements and had not led police to the body. The body was right next to the end of a culvert located beneath a road. Much of the body was covered with snow, but her face and part of her brightly colored striped shirt were not touched by snow and were completely exposed to the view of any person looking at the end of a culvert. The searchers were going into the ditches to look into all culverts, and they would have searched along the road where the culvert and body were located.

528 F. Supp. at 671.

Respondent also attacked the impartiality of the trial court in the form of an affidavit submitted by Respondent's trial counsel stating that the Judge told him in informal conversation the chances of reversal on the issue of inevitable discovery were about 50-50 and that if he were prosecuting, he would have put on more evidence for the State. *See* Crawford Affidavit, Joint App. at 172. Even taking these self serving allegations at face value,

they do not show that Respondent did not have a full and fair opportunity to litigate the issue. In Iowa, findings of fact on constitutional questions in criminal cases are reviewed de novo by the Supreme Court. *See State v. Williams*, 285 N. W. 2d at 260-262. The court's reported observations thus do not suggest any bias or partiality, and the issue was not raised on direct appeal.

Extension of *Stone v. Powell* to the present case would vindicate the policies of repose and finality in the criminal law. As Justice Harlan noted: "If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definite answer to the questions litigants present or else it never provides an answer at all. *Mackey v. United States*, 401 U. S. 667, 691 (1970). This case already comes close to the "or else" feared by Justice Harlan. It is respectfully submitted that the interest in finality and repose on the issue of admissibility of evidence which in fact enhances the integrity and reliability of the factfinding process overrides all other considerations.

CONCLUSION

For the above mentioned reasons, it is respectfully submitted that the decision of the Court of Appeals in this case must be *Reversed.*

Respectfully submitted,
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